Supreme Court of Wisconsin

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Testimony
of
Nancy M. Rottier
on behalf of the
Director of State Courts

Senate Bill 51
Changes to John Doe Statutes

Senate Committee on Judiciary, Corrections, Insurance,
Campaign Finance Reform and Housing
February 25, 2009

Senator Taylor and members of the Committee, my name is Nancy Rottier. I am the Legislative Liaison for the Director of State Courts. I am speaking today on behalf of the Legislative Committee of the Judicial Conference in support of Senate Bill 51. The Judicial Conference is made up of all the judges in Wisconsin.

We believe SB 51 represents a reasonable measure that will allow judges to handle John Doe petitions fairly and more efficiently without eliminating the right of Wisconsin citizens to have this avenue available for their complaints. If you are interested in a historical background of the John Doe procedures, you might want to read the Supreme Court's decision in *State v. Washington,* 83 Wis. 2d 808 (1978).

In the last few years, the number of John Doe actions filed with the circuit courts has risen dramatically. In 2004 our case management system shows only 26 cases were filed. The number rose to 51 cases in 2005, 94 cases in 2006 and 132 cases in 2007. I should have the 2008 filing data soon and will provide that to the committee when it is available. While the number of cases is still small, the process is a time-consuming one for the courts, requiring a good deal of the judge's time to review the submission and determine whether a hearing should be held. The cases also tend to be concentrated in counties where state prisons are located, so the workload is not spread evenly across the state.

In the ordinary course of events, criminal charges are brought by the district attorney's office. However, if the district attorney (DA) has elected not to issue a charge in a particular case, the aggrieved citizen (the alleged victim) may petition the court directly in a John Doe proceeding, asking the court to review the case and issue the criminal charge.

If the petition alleges facts that, if true, would constitute a crime, then the court is required to conduct an evidentiary hearing. This hearing is not like a trial but it is more like a preliminary hearing in a felony case. I have attached to my testimony a copy of *State ex rel Reimann v. Circuit Court for Dane,* 214 Wis. 2d 605 (1997), one of the important Supreme Court decisions describing what the judge's responsibilities are when a John Doe complaint has been filed.

As the *Reimann* case makes clear, in a John Doe hearing, the court has to limit its focus to whether the petitioner puts in a plausible account of a crime taking place. If such an account is rendered, the court is compelled, under the current statutes, to issue a criminal complaint in the case. The court may not consider the credibility of the witnesses, look at police or DA investigatory files, nor weigh the evidence on each side of the issue. Those considerations are ultimately left to the discretion of the special prosecutor in the subsequent criminal case. If the special prosecutor ultimately determines that the petitioner's story is not sufficiently credible, the prosecutor, and not the court, then has the discretion to dismiss the criminal charge.

There have been a significant number of John Doe petitions filed in the recent past by inmates located in state correctional facilities. Judges have dismissed some of these petitions for failing to meet the *Reimann* standard. But under the current statutes, judges are required to review the inmates' petitions and required to conduct hearings if the standard is met. To do anything less would be to shirk their duties, which would be the ultimate miscarriage of justice.

Some have suggested dealing with this increasing caseload by limiting the right of a prison inmate to bring a John Doe petition. That would certainly eliminate many of current cases, but we believe this is too drastic a remedy. It eliminates valid petitions and puts them on the same plane as frivolous ones. We believe SB 51 represents a better balance – preserving the rights of individuals to bring John Doe petitions while giving judges more tools to efficiently process the petitions that are brought.

To show the limitations of the current statutes and give an idea of how we think the law would be used if SB 51 passes, I have attached the recent case of *State ex rel Williams v. Fiedler,* 282 Wis. 2nd 486 (2005). In that case, Judge Patrick Fiedler of Dane County essentially used the

approach that SB 51 would allow. He considered police investigation reports and a letter from the DA. He considered the credibility of the witnesses and weighed the evidence on each side. He considered the prosecutive merit of the case and concluded a hearing was not required and would have been a waste of public resources. The Court of Appeals overturned Judge Fiedler's decision, not because it disagreed with his analysis of the evidence but rather because the current statute imposes restrictions on a judge using his common sense and legal training to evaluate a petition in this manner.

We believe the *Williams* case provides a road map for how the statute could be improved to allow a judge to consider factors in the way Judge Fiedler did. SB 51 would change the law to make those factors available for consideration by all John Doe judges. We urge you to adopt this approach.

I would be happy to answer any questions. Thank you.

ing to this court of his inability to pay the costs within that time, the license of Herbert L. Usow to practice law in Wisconsin shall remain suspended until further order of the court.

¶ 17. IT IS FURTHER ORDERED that Herbert L. Usow comply with the provisions of SCR 22.26 concerning the duties of a person whose license to practice law in Wisconsin has been suspended.

STATE of Wisconsin EX REL. Thomas W. REIMANN, Petitioner,

v.

CIRCUIT COURT FOR DANE COUNTY and the Honorable Michael B. Torphy, Respondents-Petitioners.

Supreme Court

No. 96–2361–W. Oral argument October 8, 1997.—Decided December 16, 1997.

(Review of a decision of the court of appeals.)

(Also reported in 571 N.W.2d 385.)

RESEARCH REFERENCES

Am Jur 2d, Criminal Law § 1 et seq.
See ALR Index under Criminal Law.

1. **Statutes § 175*—interpretation of statute—question of law.**
   Statutory interpretation is question of law.

2. **Appeal and Error § 631*—questions of law—review—deference to lower courts.**
   Supreme court reviews questions of law de novo, without giving deference to decisions of lower courts.

3. **Statutes § 197*—interpretation of statute—legislative intent—ascertainment.**
   Ultimate goal of statutory interpretation is to ascertain and give effect to intent of legislature.

4. **Statutes § 268*—interpretation of statute—unambiguous language—ordinary and accepted meaning.**

***See Callaghan's Wisconsin Digest, same topic and section number.**

If statute is unambiguous, supreme court will apply ordinary and accepted meaning of language of statute to facts before it, and court is prohibited from looking beyond such language to ascertain its meaning.

5. **Statutes § 280*—mandatory words—shall—presumption.**

General rule is that word "shall," when used in statute, is presumed to be mandatory unless another construction is necessary to carry out clear intent of legislature.

6. **Statutes § 280*—provision of statute—words shall and may—precise meanings.**

When words "shall" and "may" are used in same section of statute, court can infer that legislature was aware of different denotations and intended words to have their precise meanings.

7. **Criminal Law and Procedure § 81*—John Doe proceeding—examination of complainant and witnesses—mandatory requirement.**

Once John Doe complainant has shown that he or she has reason to believe that crime has been committed, judge has no discretion to refuse to examine complainant in light of plain and unambiguous language of statute and precise and mandatory meaning of word "shall" in statute which provides that if person complains to judge that he or she has reason to believe that crime has been committed within his or her jurisdiction, judge shall examine complainant under oath and any witnesses produced by him or her (Stats § 968.26).

8. **Statutes § 202.20*—ambiguity—legislative intent—determination.**

When faced with ambiguous statute, courts should use established rules of statutory construction to help determine intent of legislature.

9. **Statutes § 267*—words—common and approved usage—dictionary definitions.**

*See Callaghan's Wisconsin Digest, same topic and section number.

In absence of statutory definitions, supreme court construes all words according to their common and approved usage, which may be established by dictionary definitions.

10. **Statutes § 290*—construction—surplusage.**

It is basic rule of statutory construction that courts are to give effect to every word of statute, if possible, so that no portion of statute is rendered superfluous.

11. **Statutes § 200*—interpretation of statute—supporting underlying purpose.**

Statutes should be interpreted in manner that supports their underlying purpose.

12. **Criminal Law and Procedure § 91*—John Doe proceeding—investigatory tool—commission of crime.**

John Doe proceeding is intended as investigatory tool used to ascertain whether crime has been committed and if so, by whom.

13. **Criminal Law and Procedure § 91*—John Doe proceeding—protection of innocent citizens—frivolous and groundless prosecutions.**

John Doe proceeding is designed to protect innocent citizens from frivolous and groundless prosecutions.

14. **Statutes § 231*—construction—avoiding absurd results.**

It is fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided.

15. **Criminal Law and Procedure § 81*—John Doe proceeding—examination of complainant and witnesses—commission of crime—objective test.**

Under statute providing that if person complains to judge that he or she has reason to believe that crime has been committed within his or her jurisdiction, judge shall examine complainant under oath and any witnesses produced by him or her, John Doe complainant must establish that he or she has "reason to believe" crime has been com-

*See Callaghan's Wisconsin Digest, same topic and section number.

mitted within that judge's jurisdiction, and complainant must do more than merely allege that crime has been committed since before circuit court judge is required to conduct examination of complainant, that complainant, in his or her petition, must allege objective, factual assertions sufficient to support reasonable belief that crime has been committed (Stats § 968.26).

16. Criminal Law and Procedure § 81*—John Doe proceeding—examination of complainant and witnesses—commission of crime—reason to believe standard.

Under statute providing that if person complains to judge that he or she has reason to believe that crime has been committed within his or her jurisdiction, judge shall examine complainant under oath and any witnesses produced by him or her, "reason to believe" standard pursuant to which John Doe complainant must allege objective, factual assertions sufficient to support reasonable belief that crime has been committed is not equated with probable cause required to support criminal complaint, since there is no requirement that finding of probable cause be made before John Doe proceeding is commenced where statute prescribes that determination of probable cause is to be made after subpoena and examination of witnesses (Stats § 968.26).

17. Criminal Law and Procedure § 91*—John Doe proceeding—examination of complainant and witnesses—commission of crime—denial of petition.

Statute providing that if person complains to judge that he or she has reason to believe that crime has been committed within his or her jurisdiction, judge shall examine complainant under oath and any witnesses produced by him or her, does not require that judge conduct time-consuming hearing of petitions that are spurious, frivolous, or groundless, since circuit court judge to whom John Doe petition has been presented must first determine from face of petition whether complainant has shown that he or she has reason to believe that crime has been committed, and if judge finds that complainant has made such showing, judge has no choice but to examine complainant under oath, but if judge finds that complainant has failed to establish reason to believe that crime has been committed, that judge may deny John Doe petition without conducting examination (Stats § 968.26).

*See Callaghan's Wisconsin Digest, same topic and section number.

18. Criminal Law and Procedure § 91*—John Doe proceeding—examination of complainant and witnesses—commission of crime—request for additional information.

In determining whether John Doe petition is worthy of further treatment under statute providing that if person complains to judge that he or she has reason to believe that crime has been committed within his or her jurisdiction, judge shall examine complainant under oath and any witnesses produced by him or her, circuit court judge must act as neutral and detached magistrate and judge should not weigh credibility of complainant or choose between conflicting facts and inferences, and where mere technical error on face of John Doe petition, or inadequacy in facts alleged therein, can be cured by simple request for additional information, justice may be best served under statute by judge simply making such request or examining complainant (Stats § 968.26).

19. Criminal Law and Procedure § 81*—John Doe proceeding—examination of complainant and witnesses—commission of crime—discretion of court.

Under statute providing that if person complains to judge that he or she has reason to believe that crime has been committed within his or her jurisdiction, judge shall examine complainant under oath and any witnesses produced by him or her, discretion of limited nature is conferred upon judge, and there must be evidence that discretion was in fact exercised, and if circuit court judge

*See Callaghan's Wisconsin Digest, same topic and section number.

denies petition for further proceedings without examining complainant, that decision is subject to review under provisions of statute by which writ of mandamus may be sought to compel judge to conduct under oath examination of complainant and any witnesses he or she might produce (Stats §§ 809.51, 968.26).

20. Criminal Law and Procedure § 81*—John Doe proceeding—examination of complainant and witnesses—commission of crime—determination.

Where complainant filed petition for John Doe proceedings under oath in circuit court alleging certain criminal conduct by Wisconsin Department of Justice special agent and by county assistant district attorney but judge applied wrong rule of law when he denied petition without conducting hearing or examining complainant after judge determined that some allegations contained in John Doe petition were not actionable because they fell outside statute of limitations, supreme court affirmed decision of court of appeals granting supervisory writ and directed judge to conduct further proceedings to determine whether complainant in his John Doe petition established that he had reason to believe that punishable crime had been committed within judge's jurisdiction, and if judge determined that crimes alleged in complainant's John Doe petition were beyond applicable statute of limitations, he could deny petition without conducting examination of complainant (Stats § 968.26).

REVIEW of a decision of the Court of Appeals. *Modified and as modified, affirmed.*

For the respondents-petitioners the cause was argued by *James H. McDermott*, assistant attorney general, with whom on the briefs was *James E. Doyle*, assistant attorney general.

For the petitioner there was a brief by *Peter DeWind* and *Legal Assistance to Institutionalized Persons*, Madison and oral argument by *Peter DeWind*.

*See Callaghan's Wisconsin Digest, same topic and section number.

¶ 1. DONALD W. STEINMETZ, J. There is one issue presented for review: when a person complains to a circuit court judge that such person believes a crime has been committed within that judge's jurisdiction, does Wis. Stat. § 968.26[1] (1995–96)[2] require the judge to examine under oath the complainant and any witnesses produced by him or her. We conclude that Wis. Stat. § 968.26 requires a circuit court judge to conduct such an examination only when the complainant has sufficiently established that he or she has "reason to believe" that a crime has been committed within that judge's jurisdiction.

¶ 2. This is a review of the decision of the court of appeals granting a supervisory writ sought by Thomas Reimann against the Circuit Court for Dane County and Judge Michael B. Torphy, Jr., *State ex rel. Reimann v. Circuit Court for Dane County*, No. 96–2361–W (Wis. Ct. App. November 13, 1996). We modify the decision of the court of appeals, and we affirm the decision, as modified, granting a supervisory writ directing Judge Torphy to conduct further pro-

[1] Wis. Stat. § 968.26 provides, in pertinent part, as follows:

> **John Doe Proceeding.** If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in the examination is within the judge's discretion. . . .If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint may be reduced to writing and signed and verified; and thereupon a warrant shall issue for the arrest of the accused.

[2] All future references to Wis. Stats. will be to the 1995–96 version of the statutes unless otherwise indicated.

ceedings, consistent with this opinion, under Wis. Stat. § 968.26.

¶ 3. Thomas Reimann filed a petition for John Doe proceedings under Wis. Stat. § 968.26 in the circuit court, alleging certain criminal conduct by a Wisconsin Department of Justice special agent and by an assistant district attorney of Dane County. The petition was given under oath and was certified by a notary public. Judge Torphy denied the petition without conducting a hearing or examining Reimann. Upon review of Reimann's petition, the judge determined that some of the allegations contained therein were not actionable since they fell outside the statute of limitations. Judge Torphy also concluded that since Reimann presented his petition under oath and with supporting documents, "it [was] not necessary to again place Reimann under oath and take further evidence from him. . . ."

¶ 4. Reimann then petitioned the court of appeals for a supervisory writ under Wis. Stat. § 809.51(1)[3] compelling Judge Torphy to conduct further proceedings on the John Doe petition. The court of appeals granted a supervisory writ ordering that "Judge Torphy shall conduct an examination of the complainant and his witnesses, if any." The court relied heavily on the mandatory portion of Wis. Stat. § 968.26, which states "the judge shall examine the complainant. . . ." The court also concluded that Wis. Stat. § 968.26 does not require the complainant to satisfy any threshold test before an examination is required. Based on the mandatory language of Wis.

[3] Wis. Stat. § 809.51(1) provides as follows: "A person may request the court to exercise its supervisory jurisdiction or its original jurisdiction to issue a prerogative writ over a court and the presiding judge, or other person or body, by filing a petition and supporting memorandum. . . ."

Stat. § 968.26 and the absence of any threshold requirement, the court concluded that Judge Torphy was required to conduct a John Doe examination of Reimann. We accepted Judge Torphy's petition for review.

¶ 5. The sole issue presented for review is whether Wis. Stat. § 968.26 requires a judge to examine under oath the complainant and any witnesses produced by him or her, whenever such person complains that he or she believes a crime has been committed within that judge's jurisdiction. This is a question of statutory interpretation.

[1, 2]

¶ 6. Statutory interpretation is a question of law. *See Stockbridge School Dist. v. DPI*, 202 Wis. 2d 214, 219, 550 N.W.2d 96 (1996); *Jungbluth v. Hometown, Inc.*, 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996). This court reviews questions of law de novo, without giving deference to the decisions of the lower courts. *See Jungbluth*, 201 Wis. 2d at 327; *Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 979, 542 N.W.2d 148 (1996).

[3, 4]

¶ 7. The ultimate goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *See Stockbridge School Dist.*, 202 Wis. 2d at 219; *Hughes*, 197 Wis. 2d at 979; *Rolo v. Goers*, 174 Wis. 2d 709, 715, 497 N.W.2d 724 (1993). To achieve this goal, we first look to the plain language of the statute. *See Jungbluth*, 201 Wis. 2d at 327; *In re Interest of Kyle S.-G.*, 194 Wis. 2d 365, 371, 533 N.W.2d 794 (1995). If a statute is unambiguous, this court will apply the ordinary and accepted meaning of the language of the statute to the facts before it, *see Swatek v. County of Dane*, 192 Wis. 2d 47, 57, 531 N.W.2d 45 (1995), and we are prohibited from looking beyond such

language to ascertain its meaning. *See Stockbridge School Dist.*, 202 Wis. 2d at 220 (quoting *Jungbluth*, 201 Wis. 2d at 327). If a statute does not clearly set forth the legislative intent, we may look at the history, scope, context, subject matter, and object of the statute. *See id.*; *Interest of Kyle S.-G.*, 194 Wis. 2d at 371.

¶ 8. We therefore turn to the language of Wis. Stat. § 968.26 to determine whether it clearly sets forth the intent of the legislature. Section 968.26 provides in pertinent part: "If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her. . . ."

[5]

¶ 9. The obligation Wis. Stat. § 968.26 places on circuit court judges is clear and unambiguous. The plain language of Wis. Stat. § 968.26 requires a judge to examine a John Doe complainant and his or her witnesses, if any, when the complainant has reason to believe a crime has been committed within that judge's jurisdiction. The legislature made this requirement mandatory by stating "the judge *shall* examine." The general rule is that the word "shall," when used in a statute, is presumed to be mandatory unless another construction is necessary to carry out the clear intent of the legislature. *See Wagner v. State Medical Examining Bd.*, 181 Wis. 2d 633, 643, 511 N.W.2d 874 (1994); *C.A.K. v. State*, 154 Wis. 2d 612, 621–22, 453 N.W.2d 897 (1990). There is no indication that this portion of the statute is meant to be read in any manner other than mandatory.

[6, 7]

¶ 10. The mandatory nature of this requirement is supported by the legislature's careful choice of lan-

guage. When the words "shall" and "may" are used in the same section of a statute, the court can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings. *See Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 571, 263 N.W.2d 214, 217 (1978). The relevant, first sentence of Wis. Stat. § 968.26 contains the word "shall" twice and the word "may" once. In total, Wis. Stat. § 968.26 employs the words "shall" and "may" alternatively 12 different times. We can therefore infer that the legislature intended "shall" to have its precise, mandatory meaning. Applying the precise meaning of the statutory text, we conclude that once a John Doe complainant has shown that he or she has reason to believe that a crime has been committed, the judge has no discretion to refuse to examine the complainant. With this conclusion of the court of appeals, we agree.

¶ 11. We disagree, however, with the court of appeals' conclusion that Wis. Stat. § 968.26 does not impose a threshold requirement on the John Doe complainant. The operative clause of Wis. Stat. § 968.26 provides: "If a person complains to a judge *that he or she has reason to believe that a crime has been committed* . . ." (emphasis added). As we view this language, there is one prerequisite to triggering the judge's duty to examine the complainant—that the complainant first establish that he or she has "reason to believe" that a crime has been committed. *See Wolke v. Fleming*, 24 Wis. 2d 606, 612–13, 129 N.W.2d 841 (1964), *cert. denied*, 380 U.S. 917 (1965) (stating that Wis. Stat. § 968.26 requires that the complainant have reason to believe a crime has been committed within the magistrate's jurisdiction); *see also State v. Doe*, 78 Wis. 2d 161, 165, 254 N.W.2d 210 (1977) (stating that a John

Doe proceeding can be commenced only if a person complains to a judge that he or she has reason to believe that a crime has been committed within the jurisdiction). Absent a showing in the petition that the complainant has reason to believe that a crime has been committed within the circuit court judge's jurisdiction, the judge is not required to examine the complainant.

¶ 12. The language of Wis. Stat. § 968.26 is ambiguous as to what threshold showing is sufficient to establish that the complainant has "reason to believe" that a crime has been committed. The term "reason to believe" is not defined in the statute, and its meaning is "capable of being understood by reasonably well-informed persons in either two or more senses." *Parental Rights to SueAnn A.M.*, 176 Wis. 2d 673, 678, 500 N.W.2d 649 (1993)(quoting *In Interest of P.A.K.*, 119 Wis. 2d 871, 878–79, 350 N.W.2d 677 (1984)). *Compare State v. Flanagan*, 251 Wis. 517, 520, 29 N.W.2d 771 (1947)(applying objective standard to determine whether "reason to believe" existed under Wis. Stat. § 29.05(6) (1947))[4] *with Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 381, 166 N.W.2d 255 (1969)(applying subjective standard to determine whether "any reason to believe" existed under Wis. Stat. § 966.01).[5]

[4] In *State v. Flanagan*, 251 Wis. 517, 29 N.W.2d 771 (1947), the court determined whether an officer lawfully searched a vehicle under Wis. Stat. § 29.05(6) (1947), which provided that "an officer may, with or without warrant, open, enter and examine all. . .vehicles. . .where he has *reason to believe* that wild animals, taken or held in violation of this chapter are to be found . . ." (emphasis added). Based on observable acts and inferences drawn therefrom, the court concluded that the search was lawful. *See id.* at 520.

[8]

¶ 13. When faced with an ambiguous statute, courts should use the established rules of statutory construction to help determine the intent of the legislature.[6] *See SueAnn A.M.*, 176 Wis. 2d at 679; *State v. Charles*, 180 Wis. 2d 155, 158, 509 N.W.2d 85 (Ct. App. 1993). Applying accepted rules of statutory construction, we conclude that the legislature intended to adopt an objective, threshold requirement in Wis. Stat. § 968.26.

[9]

¶ 14. First, we must attempt "to find the common sense meaning and purpose of the words employed in the statute." *SueAnn A.M.*, 176 Wis. 2d at 679. Wisconsin Statutes § 968.26 does not define the term "reason to believe." In the absence of statutory definitions, this court construes all words according to their common and approved usage, which may be established by dictionary definitions. *See Swatek*, 192 Wis. 2d at 61

[5] In *Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 166 N.W.2d 255 (1969), the court determined whether a district attorney was required to order a coroner's inquest under Wis. Stat. § 966.01, which provided that a district attorney, having notice of death, "shall order an inquest if, from the surrounding circumstances, there is any *reason to believe* that death was caused by criminal conduct, suicide, or unexplained and suspicious circumstances." (emphasis added). The court concluded that the legislature selected the district attorney to make this determination because, with his experience and training, he could make the subjective judgment required by the statute. *See id.* at 381.

[6] Courts may also look to the legislative history of the statute to determine the legislature's intent. Although there is some legislative history concerning Wis. Stat. § 968.26, it is not helpful in answering the specific question before this court.

(quoting *State v. Gilbert*, 115 Wis. 2d 371, 377–78, 340 N.W.2d 511 (1983)).[7] The word "reason" is commonly defined as "an underlying fact or cause that provides logical sense for a premise or an occurrence: *There is reason to believe that the accused did not commit this crime.*" *American Heritage Dictionary of the English Language* 1506 (3rd ed. 1992)(emphasis original). The word "believe" is commonly defined as meaning "to accept as true or real" or "to credit with veracity." *See id.* at 169.

¶ 15. Employing the common definitions of the words "reason" and "believe," we conclude that the precise language of Wis. Stat. § 968.26 requires a John Doe complainant to do more than merely allege in conclusory terms that a crime has been committed. The allegation must be supported by objective, factual assertions before a circuit court judge is required to conduct an examination of the complainant. Accordingly, if a John Doe complainant, in his or her petition, presents only conclusory allegations, or fails to allege facts sufficient to raise a reasonable belief that a punishable crime has been committed, the circuit court judge may, in the exercise of his or her legal discretion, deny the petition without an examination. *Cf. Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972) (finding denial of motion to vacate a guilty plea without conducting an evidentiary hearing was not an abuse of discretion where defendant presented only conclusory allegations); *State v Smith*, 60 Wis. 2d 373, 383, 210 N.W.2d 678 (1973) (affirming decision to deny, without evidentiary hearing, motion for postconviction relief

[7] However, this general rule of statutory construction does not apply to technical words and phrases that have a peculiar meaning. *See State v. Martin*, 162 Wis. 2d 883, 904, 470 N.W.2d 900 (1991).

where allegations were conclusory and failed to raise question of fact); *State v. Bentley*, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996) (holding circuit court did not erroneously exercise its discretion in denying, without evidentiary hearing, defendant's postconviction motion).[8]

[10]

¶ 16. Second, it is a basic rule of statutory construction that courts are to give effect to every word of a statute, if possible, so that no portion of the statute is rendered superfluous. *See Lake City v. Mequon*, 207 Wis. 2d 156, 163, 558 N.W.2d 100 (1997); *State v. Petty*, 201 Wis. 2d 337, 355, 548 N.W.2d 817 (1996). Reimann argues that Wis. Stat. § 968.26 does not impose a threshold requirement on John Doe complainants. In essence, Reimann asks us to adopt a subjective test of "reason to believe," that a judge is required to examine every complainant who complains that he or she subjectively believes a crime has been committed. This reading of Wis. Stat. § 968.26 would render the "reason to believe" language superfluous. The only logical purpose for including this language would be to require the complainant to establish something more than mere subjective belief. Had the legislature intended to employ a subjective test, it could have done so by requiring an examination if a person simply complains to a judge "that he or she *believes* that a crime has been

[8] Although the purpose of conducting an examination of a John Doe complainant under Wis. Stat. § 968.26 is substantively different than holding an evidentiary hearing under Wis. Stat. § 974.06 (postconviction procedure), the discretion conferred upon the circuit court judge in each situation is similar as to whether the movant has alleged sufficient facts to entitle him or her to an examination or evidentiary hearing.

committed." The legislature chose not to use such language.

¶ 17. To the contrary, the legislature specifically added the "reason to believe" language in the 1949 revision of the criminal code. *See* § 33, ch. 631, Laws of 1949. Prior to the 1949 revision, the John Doe statute required a magistrate to examine a complainant merely "[u]pon complaint to such magistrate that a criminal offense had been committed . . ." Wis. Stat. § 361.02 (1947).[9] Noticeably absent from the 1947 statute is any language requiring the complainant to show "reason to believe" that a crime has been committed. The pre-revision language of the John Doe statute may have supported Reimann's subjective-test interpretation; the current language does not. The current language of Wis. Stat. § 968.26 retains the additional "reason to believe" requirement added in 1949. The legislature has chosen not to remove this threshold requirement from the John Doe statute. We refuse to do so here.

[11]

¶ 18. Third, statutes should be interpreted in a manner that supports their underlying purpose. *See Lukaszewicz v. Concrete Research, Inc.*, 43 Wis. 2d 335, 342, 168 N.W.2d 581, 585 (1969). The procedure required by Wis. Stat. § 968.26 must, of course, be consistent with the purpose of the statute.

[9] Wis. Stat. § 361.02 (1947) provided in pertinent part:

> **361.02 Complaint and warrant; John Doe Proceeding.** (1) Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witness produced by him, and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant;. . . .

[12, 13]

¶ 19. The purpose of Wis. Stat. § 968.26 is two-fold. First, and most obvious, a John Doe proceeding is intended as an investigatory tool used to ascertain whether a crime has been committed and if so, by whom. *See State v. Cummings*, 199 Wis. 2d 721, 736, 546 N.W.2d 406 (1996) (citing *State v. Washington*, 83 Wis. 2d 808, 822, 266 N.W.2d 597 (1978)); *see also* Wis. Stat. § 968.26. Second, the John Doe proceeding is designed to protect innocent citizens from frivolous and groundless prosecutions. As we explained in *State ex rel. Long v. Keyes*, 75 Wis. 288, 294–95, 44 N.W. 13 (1889):

> When [the John Doe] statute was first enacted the common-law practice was for the magistrate to issue the warrant on a complaint of mere suspicion, and he was protected in doing so. This was found to be a very unsafe practice. Many arrests were made on groundless suspicion, when the accused were innocent of the crime and there was no testimony whatever against them. This statute was made to protect citizens from arrest and imprisonment on frivolous and groundless suspicion.

A John Doe proceeding under Wis. Stat. § 968.26, therefore, serves both as an inquest into the discovery of crime and as a screen to prevent "reckless and ill-advised" prosecutions. *See Washington*, 83 Wis. 2d at 822.

¶ 20. Applying an objective test to determine whether a complainant has established "reason to believe" a crime has been committed is consistent with both purposes of the statute. The objective test permits complainants to initiate reasonable, fact-based John Doe proceedings to determine whether a crime has

been committed and if so, by whom. At the same time, it also allows the judge to screen for and weed out groundless and frivolous petitions without requiring further proceedings that may be injurious to the accused.

¶ 21. Although we recognize that crime victims and other complainants should have recourse to the judicial branch when the executive branch fails to respond to their complaints, we reject the argument that Wis. Stat. § 968.26 was designed to give all John Doe complainants their day in court. As we explained in *Washington*, the John Doe judge has no authority to ferret out crime. *See Washington*, 83 Wis. 2d at 822. Rather, the John Doe investigation is essentially limited to the subject matter of the petition filed under Wis. Stat. § 968.26. *See id.*

[14]

¶ 22. Finally, it is a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided. *See State v. Peete*, 185 Wis. 2d 4, 17, 517 N.W.2d 149 (1994); *State v. Pham*, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987). Adopting Reimann's interpretation of Wis. Stat. § 968.26 would lead to absurd results. We specifically held in *Washington* that a John Doe proceeding cannot be used to obtain evidence against a defendant for a crime with which the defendant has already been charged. *See Washington*, 83 Wis. 2d at 824. Under the interpretation Reimann suggests, a circuit court judge would have no choice but to examine under oath a complainant, and his or her witnesses, even if that judge were precluded by our decision in *Washington* from conducting further proceedings. The legislature surely did not intend this absurd result.

¶ 23. In addition, under Reimann's interpretation of Wis. Stat. § 968.26, a circuit court judge would be required to conduct an examination of the complainant and his or her witnesses even if: (1) the facts alleged in the John Doe petition could not possibly constitute a crime; (2) prosecution of the crime alleged in the petition is barred by the statute of limitations; or (3) the petition is patently meritless or is filed merely as an abuse of process. Requiring a circuit court judge to conduct examinations in such cases would be unreasonable and would result in a waste of limited judicial resources.

[15]

¶ 24. Applying these established rules of statutory construction, we conclude that Wis. Stat. § 968.26 imposes a threshold requirement on persons filing petitions for John Doe proceedings. Before a circuit court judge's obligation to conduct an examination under Wis. Stat. § 968.26 is triggered, the John Doe complainant must establish that he or she has "reason to believe" a crime has been committed within that judge's jurisdiction. Under the interpretation of Wis. Stat. § 968.26 we apply today, a John Doe complainant must do more than merely allege that a crime has been committed. Before a circuit court judge is required to conduct an examination of a complainant, that complainant, in his or her petition, must allege objective, factual assertions sufficient to support a reasonable belief that a crime has been committed.

[16]

¶ 25. We do not equate this "reason to believe" standard of Wis. Stat. § 968.26 with the probable cause required to support a criminal complaint.[10] There is no

[10] Unlike a petition for John Doe proceedings, a criminal complaint must set forth certain facts which would lead a rea-

requirement that a finding of probable cause be made before a John Doe proceeding is commenced. To the contrary, the statute prescribes that a determination of probable cause is to be made after subpoena and examination of the witnesses. We reaffirm our statement in *Washington*:

> The John Doe complaint. . .need not name a particular accused; nor need it set forth facts sufficient to show that a crime has probably been committed. The John Doe is, at its inception, not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime. . . .

Washington, 83 Wis. 2d at 822. Although the line dividing "reason to believe" from probable cause may appear slight, its position in Wis. Stat. § 968.26 must remain secure.

[17]

¶ 26. The John Doe procedure we adopt today gives citizens access to an impartial and neutral jurist for review of their criminal complaints. It does not, however, require the judge to conduct a time-consuming hearing of petitions that are spurious, frivolous, or groundless. The circuit court judge to whom a John Doe petition has been presented, therefore, must first determine from the face of the petition whether the complainant has shown that he or she has reason to believe that a crime has been committed. If the judge finds that the complainant has made such a showing, the judge has no choice but to examine the complainant

sonable person to conclude that a crime had probably been committed and that the defendant named in the complaint was probably the culpable party. *See State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 12 (1971); *State v. White*, 97 Wis. 2d 193, 203, 295 N.W.2d 346 (1980).

under oath. If, however, the judge finds that the complainant has failed to establish "reason to believe," that judge may deny the John Doe petition without conducting an examination.

[18]

¶ 27. This, of course, is not to say that the judge's decision may rest upon prejudice or caprice. In determining whether the petition is worthy of further treatment, a circuit court judge must act as a neutral and detached magistrate. In making this decision, the judge should not weigh the credibility of the complainant or choose between conflicting facts and inferences. *See State v. Schober*, 167 Wis. 2d 371, 381, 481 N.W.2d 689 (Ct. App. 1992). For some complainants, the John Doe procedures available under Wis. Stat. § 968.26 provide their only entrance to the state courts. Although we believe that circuit court judges must perform some gate-keeping functions under Wis. Stat. § 968.26, we do not here intend to close the doors of the courtroom to those persons who may have reason to believe a crime has been committed. In addition, the judge must recognize that many John Doe petitions are filed *pro se* by complainants not trained in the complexities of criminal law and procedure. Where a mere technical error on the face of the petition, or an inadequacy in the facts alleged therein, can be cured by a simple request for additional information, justice may be best served under Wis. Stat. § 968.26 by the judge simply making such request or examining the complainant.

[19]

¶ 28. Discretion of a limited nature is conferred upon the judge by Wis. Stat. § 968.26, and there must be evidence that discretion was in fact exercised. If a circuit court judge denies a petition for further proceed-

ings without examining the complainant, that decision is subject to review under the provisions of Wis. Stat. § 809.51, by which a writ of mandamus may be sought to compel the judge to conduct under oath an examination of the complainant and any witnesses he or she might produce.

[20]

¶ 29. Based on the foregoing, we modify the decision of the court of appeals. The court of appeals erred in concluding that Judge Torphy was required to examine Reimann without considering whether Reimann satisfied the threshold requirement Wis. Stat. § 968.26 places on John Doe complainants. Since we also conclude that Judge Torphy applied the wrong rule of law, we affirm the decision of the court of appeals granting a supervisory writ. We direct Judge Torphy to conduct further proceedings, consistent with this opinion, to determine whether Reimann, in his John Doe petition, has established that he has reason to believe that a punishable crime has been committed within Judge Torphy's jurisdiction. If Judge Torphy determines that the crimes alleged in Reimann's petition are beyond the applicable statute of limitations,[11] he may deny the petition without conducting an examination of Reimann.

[11] In determining whether the crimes alleged by Reimann are beyond the appropriate statute of limitations, Judge Torphy, like any judge applying a statute of limitations, must consider not only the time having passed since the alleged crime occurred, but also the occurrence of events and the existence of factors that may have tolled the running of the statute of limitations.

By the Court.—The decision of the court of appeals is modified and as modified, affirmed.

STATE of Wisconsin EX REL. Oscar J. WILLIAMS, Petitioner,

v.

The Honorable Patrick J. FIEDLER, presiding, Respondent.

Court of Appeals

No. 2004AP175-W. Submitted on briefs October 14, 2004. —Decided April 14, 2005.

2005 WI App 91

(Also reported in 698 N.W.2d 294.)

RESEARCH REFERENCES

Am Jur 2d, Criminal Law § 550 et seq.
See ALR Index under Criminal Procedure Rules.

1. **Criminal Law and Procedure § 91*—complaint or affidavit—conduct and sufficiency of John Doe proceeding—reason to believe crime committed—objective standard.**

When determining whether John Doe petitioner has alleged "reason to believe" crime has been committed, as would trigger circuit court's duty to examine John Doe complainant, circuit judges must apply objective standard; petitioner must allege facts sufficient to raise reasonable belief that punishable crime has been committed, and conclusory allegations are insufficient (Stats § 968.26).

*See Callaghan's Wisconsin Digest, same topic and section number.

2. **Criminal Law and Procedure § 91*—complaint or affidavit—conduct and sufficiency of John Doe proceeding—petition's conclusory allegations—grounds for denial without examination.**

If John Doe complainant, in his petition, presents only conclusory allegations, or fails to allege facts sufficient to raise reasonable belief that punishable crime has been committed, circuit court judge may, in exercise of his or her legal discretion, deny petition without examination (Stats § 968.26).

3. **Criminal Law and Procedure § 91*—complaint or affidavit—conduct and sufficiency of John Doe proceeding—reason to believe crime committed—need to examine complainant.**

Complainant's petition under John Doe statute contained "reason to believe" crime had been committed, and thus, trial court judge was required to examine complainant under oath and any witnesses produced by him, in proceeding in which complainant filed petition requesting commencement of John Doe proceeding; petition presented complainant's firsthand account of battery, and according to complainant, complainant did nothing to provoke perpetrator, perpetrator followed complainant as complainant left area of initial verbal confrontation, and perpetrator brutally attacked complainant with assistance of two young men (Stats § 968.26).

4. **Criminal Law and Procedure § 91*—complaint or affidavit—conduct and sufficiency of John Doe proceeding—reason to believe crime committed—improper consideration of material extraneous to petition.**

Trial judge improperly considered material extrinsic to petition requesting commencement of John Doe proceeding, consisting of police reports, in determining whether complainant's petition presented "reason to believe" crime had been committed, as would trigger court's duty to examine John Doe complainant (Stats § 968.26).

*See Callaghan's Wisconsin Digest, same topic and section number.

MANDAMUS to the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Writ granted.*

On behalf of the petitioner, the cause was submitted on the brief of *Oscar J. Williams, pro se.*

On behalf of the respondent, the cause was submitted on the briefs of *David C. Rice*, assistant attorney general, and *Peggy A. Lautenschlager*, attorney general.

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶ 1. LUNDSTEN, J. This case comes before us on a petition for a supervisory writ of mandamus. Oscar Williams filed a petition with Circuit Judge Patrick Fiedler requesting commencement of a John Doe proceeding. Under WIS. STAT. § 968.26 (2003–04),[1] "[i]f a person complains to a judge that he or she has reason to believe that a crime has been committed" within the judge's jurisdiction, the judge must conduct an evidentiary hearing at which the complaining person testifies and may present other witnesses. In this case, the circuit judge reviewed Williams' petition and also obtained and reviewed police reports containing information casting doubt on assertions in the petition. The circuit judge rejected the petition, explaining that his review of the petition and the police reports led him to conclude that the petitioner "failed to allege facts sufficient to raise a reasonable belief that a punishable, or, for that matter provable, crime has been committed."

¶ 2. As will become clear, the circuit judge in this case applied his common sense and reasonably concluded that conducting a John Doe hearing would be a waste of time. Nonetheless, we grant the writ, and

[1] All references to the Wisconsin Statutes are to the 2003–04 version unless otherwise noted.

thereby effectively reverse, because the circuit judge reached this reasonable conclusion by assessing credibility and choosing between competing inferences. The John Doe statute, as interpreted in *State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2d 605, 615, 571 N.W.2d 385 (1997), does not permit this sort of analysis at the threshold stage of determining whether a John Doe petition contains reason to believe that a crime has been committed.

Background

¶ 3. Williams filed a petition for a John Doe proceeding under WIS. STAT. § 968.26. Williams' petition alleged that Joseph Heise attacked and beat him. The petition makes the following allegations:

- On December 18, 2002, after bar closing time at approximately 2:30 a.m., Williams was standing in a line outside a restaurant on State Street in Madison.
- Williams was approached by a panhandler, a man later identified as Joseph Heise.
- Heise asked for some change, and Williams told Heise to "go get a job."
- Williams, a black male, heard "a lot of heckling in the background from numerous college students, saying 'are you going to let that nigger talk to you like that?' "
- Williams was the only black person "in sight."
- Williams decided to leave and walked to a different restaurant, LaBamba's, "around the corner from where I had originally been."
- As Williams neared LaBamba's, he "heard running footsteps" behind him.

- Williams attempted to turn, and he was "met with a flying kick in the lower back" inflicted by Heise, a kick that caused Williams to fall to the ground.
- Heise told Williams that Heise would "kick [Williams'] black ass."
- "[T]wo other younger Caucasian men who appeared to be college students joined Heise, and Heise started to punch [Williams] in the face over and over again."
- All three men "took turns punching and hitting [Williams] in the head" while saying " 'nigger . . . I'll kill your black ass . . . don't ever talk back to a white man . . .' and other profanities."
- Williams was "in and out of consciousness, and last heard them say 'let's get out of here.' "
- Williams "stumbled" to his feet and noticed he "couldn't see, and that [his] eyes were beginning to feel heavy indicating that they were swollen shut."
- Williams walked to a food store, where an employee called "Fire Rescue," and he was transported to UW Hospital.

Williams' petition also asserts that the incident was investigated by the Madison Police Department "under incident report no. 2002–152973" and that the district attorney refused to pursue the matter.

¶ 4. After receiving Williams' petition, the circuit judge asked the district attorney to supply copies of police reports and also asked whether he considered filing charges. The district attorney responded with a letter and copies of several police reports. The district attorney stated in his letter to the judge that the case had apparently not been referred to his office but, having reviewed the materials, he did not believe there was a basis for proceeding with criminal charges against Heise.

¶ 5. The police reports sent to the circuit judge stated that officers located and interviewed both Williams and Heise shortly after the altercation that led to Williams' injuries. The reports state that at about 2:46 a.m. on the night Williams was taken to the hospital, a man named Joseph Heise approached a police officer near State Street. Heise gave an account to the police that, with notable exceptions, roughly tracked the account Williams provided to the circuit judge in his John Doe petition.

¶ 6. According to Heise, it was Williams who followed Heise to LaBamba's. Heise told police that Williams threatened Heise with a knife and that Heise defended himself by punching Williams in the face until Williams gave up his knife. Heise said he kicked the knife away and then put it under a nearby dumpster so his attacker would not have access to it. After giving this account to police, an officer took Heise to where Heise said the altercation occurred and Heise showed the officer the knife under the dumpster. The officer observed two small pools of blood, retrieved the knife, and observed the knife had blood on it. A subsequent test of the knife produced no fingerprint evidence.

¶ 7. The police reports indicate that during the time Heise was being questioned near State Street, an officer attempted to question Williams at the UW Hospital Emergency Room. The officer who interviewed Williams reported that Williams' face was bloody and swollen. Williams was treated for a broken nose and required stitches over one eye. The officer smelled a strong odor of intoxicants emanating from Williams. He observed that Williams was uncooperative with medical personnel, that Williams was angry and agitated, and that Williams alternated between

being uncooperative and somewhat cooperative. Williams told the officer that he had been "jumped by some white boys" and gave a physical description of one of them. Williams said all three took turns striking him.

¶ 8. Williams was asked whether a weapon was involved. He said: "Yeah. No knife." He described the weapon as a "billy-jack," but would not further describe the weapon. The officer wrote that a "billy-jack" is an item filled with lead. The officer also wrote that although Williams initially said that his assailants said nothing during the attack, when he was later asked if they said anything during the attack, Williams responded, "Nigger 'shit.' "

¶ 9. The police reports show that neither Williams nor Heise was arrested at the time, but an officer was assigned to do a follow-up investigation. This officer's efforts failed to locate either man. However, about two weeks later, on January 2, 2003, Williams was in court for an "unrelated" preliminary hearing. At that time, an officer asked Williams if he wanted to make a statement about the incident involving Joseph Heise. Williams told the officer he did not wish to make any statement.[2]

¶ 10. About three weeks later, on January 23, 2003, an officer was dispatched to the county jail where Williams was incarcerated. Williams wanted to report an alleged battery committed by Heise against Williams about a week before Christmas. Williams said he waited to complain because he first learned Heise's full name when Williams was arraigned on charges stemming

[2] In his petition for a writ of mandamus filed in this court, Williams denies that the police officer who questioned him on January 2, 2003, told him Joseph Heise's name.

from an altercation he had with Heise on January 9, 2003.[3]

¶ 11. After reviewing Williams' petition, the district attorney's letter, and the police reports, the circuit judge denied Williams' petition. The judge wrote:

> The court notes from its review of the City of Madison incident report that the Madison Police Department did conduct an investigation of the allegations and that the petitioner was not cooperative. According to the incident report, there are no independent witnesses to corroborate the allegations made by the petitioner. The alleged assailant has cooperated with the police and indicated that the petitioner came at him with a knife and that the alleged assailant was acting in self-defense. Based upon my review of the incident reports, I am satisfied that a John Doe proceeding is not necessary, as it would simply be an effort to duplicate what the City of Madison Police Department has already done. I am further satisfied that a review of these materials and of the petition leads me to conclude that the petitioner has failed to allege facts sufficient to raise a reasonable belief that a punishable, or, for that matter provable, crime has been committed. Thus, in the exercise of my discretion, I'm DENYING the petition without an examination.

After receiving this decision, Williams filed a petition for a writ of mandamus asking this court to order that a John Doe hearing be held.

[3] In his petition for a writ, Williams asserts that he stabbed Heise on January 9, 2003, in self-defense after Heise appeared out of nowhere and attacked Williams. Reports attached to Williams' writ indicate that Williams, who was born in 1949, has spent about 35 years of his life in prison and has psychological problems. It appears that Williams was convicted and sentenced to prison as a result of stabbing Heise.

Discussion

¶ 12. Williams filed a petition under the John Doe statute with the circuit judge, requesting that the judge take Williams' testimony under oath. The John Doe statute, WIS. STAT. § 968.26, provides, in pertinent part:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her . . . .

The supreme court has interpreted this language to mean that "once a John Doe complainant has shown that he or she has reason to believe that a crime has been committed, the judge has no discretion to refuse to examine the complainant." *State ex rel. Reimann v. Circuit Court for Dane County*, 214 Wis. 2d 605, 615, 571 N.W.2d 385 (1997).

[1, 2]

¶ 13. When determining whether a John Doe petitioner has alleged "reason to believe," circuit judges must apply an objective standard. A petitioner must "allege facts sufficient to raise a reasonable belief that a punishable crime has been committed." *Id.* at 618. Conclusory allegations are insufficient. *Id.* "[I]f a John Doe complainant, in his or her petition, presents only conclusory allegations, or fails to allege facts sufficient to raise a reasonable belief that a punishable crime has been committed, the circuit court judge may, in the exercise of his or her legal discretion, deny the petition without an examination." *Id.*

[3]

¶ 14. Williams' petition, viewed by itself, presents "reason to believe" that a crime was committed in the circuit judge's jurisdiction. Specifically, the petition presents Williams' firsthand account of the battery Heise allegedly perpetrated in Dane County in December of 2002. In Williams' telling of the incident, he did nothing to provoke the panhandling Heise, except to tell Heise to get a job. According to Williams, Heise followed Williams as Williams left the area of the initial verbal confrontation, and Heise brutally attacked Williams with the assistance of two young men.

¶ 15. The circuit judge did not rule that Williams' petition, viewed in isolation, failed to allege facts constituting "reason to believe" that a crime had been committed. Instead, the judge's decision concludes that Williams' petition, considered in light of information in the police reports and the district attorney's letter, does not, in the words of the judge's written decision, "allege facts sufficient to raise a reasonable belief that a punishable, or, for that matter provable, crime has been committed."

Reason to Believe

¶ 16. We first address the circuit judge's argument that a "provable" crime was not alleged. The judge argues, in effect, that he was entitled to consider the chances of a successful prosecution when deciding whether the petition met the "reason to believe" standard.[4]

¶ 17. The judge contends he reasonably interpreted the John Doe statute as requiring Williams to make a showing that a "provable" crime was committed. The judge explained in his written decision that there were no witnesses to corroborate Williams' allegations.

[4] Although we refer to arguments as being made by the circuit judge, we note that the judge is represented on appeal by the Attorney General.

He also noted that Heise cooperated with the police and told police that he acted in self-defense when Williams came at him with a knife. Finally, the judge expressed his belief that a John Doe proceeding would "simply be an effort to duplicate what the City of Madison Police Department has already done." To this list we could add that the reports say that Heise voluntarily approached the police about the incident and that Williams was intoxicated, uncooperative, and inconsistent.

¶ 18. We understand the circuit judge's use of the word "provable" to mean that the information in the police reports persuaded him that there was essentially no chance a judge or jury would find, beyond a reasonable doubt, that Heise committed a crime. The circuit judge argues that he "reasonably afforded some deference to the charging decision of the district attorney" and that he reasonably decided, based on all the information before him, that there was "insufficient objective evidence of a provable crime." Under these circumstances, according to the judge, the "reason to believe" standard is not met because there is no showing that a "provable" crime had been committed.

¶ 19. We agree that it was reasonable for the circuit judge to predict that Williams would not succeed in persuading a fact finder that Heise is guilty beyond a reasonable doubt. But we think the John Doe statute precludes this sort of assessment by the judge at the petition stage. Indeed, the circuit judge's appellate brief aptly sums up the issue:

> At its core, this case requires [the court of appeals] to decide if Judge Fiedler properly determined that Williams failed to satisfy the objective, threshold requirement for commencing a John Doe proceeding, or whether Judge Fiedler improperly weighed Williams' credibility or chose between conflicting facts and inferences.

¶ 20. In *Reimann*, the supreme court explained that when judges assess "reason to believe," they "should not weigh the credibility of the complainant or choose between conflicting facts and inferences." *Id.* at 625. Furthermore, *Reimann* teaches that the "reason to believe" standard is somewhat lower than probable cause. According to *Reimann*, the " 'John Doe complaint . . . need not name a particular accused; nor need it set forth facts sufficient to show that a crime has probably been committed. The John Doe is, at its inception, not so much a procedure for the determination of probable cause as it is an inquest for the discovery of crime . . . .' " *Id.* at 624 (quoting *State v. Washington*, 83 Wis. 2d 808, 822, 266 N.W.2d 597 (1978)).

¶ 21. The story Williams tells in his petition is a plausible account of a battery. The judge's negative assessment of Williams' story is based on information in the police reports strongly indicating that Heise's assertion of self-defense is more credible. In the words of the circuit judge's brief, this is a "classic 'he said-he said' " case, with the police reports indicating that the evidence would show Heise was more worthy of belief than Williams. Thus, we can only conclude that the judge's rejection of Williams' petition was a result of weighing Williams' credibility and choosing between conflicting facts and inferences, something prohibited by *Reimann*.

¶ 22. We readily acknowledge that the John Doe statute, as construed in *Reimann*, is subject to abuse. This case is a good example. Our review of the police reports leads us, like the circuit judge, to believe that it is a virtual certainty that examining Williams under oath will be a waste of judicial resources and, in this case, prison and law enforcement resources, since it appears Williams is currently serving a prison term. But our belief is based on the same type of credibility assessment

the circuit judge must have engaged in. The John Doe statute, as interpreted in *Reimann*, does not permit this assessment at this threshold stage in the process. And, the circuit judge does not suggest a viable construction of the John Doe statute that would preserve its readily apparent purpose but limit the sort of abuse likely going on here.

Consideration of the Police Reports

[4]

¶ 23. As is apparent from the discussion above, if we assume the circuit judge properly considered the police reports, we nonetheless conclude the circuit judge erred when he denied Williams' petition without examining Williams under oath. Nonetheless, we briefly address the circuit judge's consideration of those police reports.

¶ 24. In an order requesting appellate briefing, we indicated that the circuit judge was free to make all arguments he believed supported his decision. But we specifically asked that the following question be addressed: Did the circuit judge properly consider "material extrinsic to the petition" in determining whether Williams' petition presented "reason to believe" within the meaning of the John Doe statute? Responding to our request, the circuit judge argues that his consideration of the police reports was proper for two reasons. We do not find either persuasive.[5]

¶ 25. We understand the circuit judge's first argument to be this: Although the police reports were not

[5] As indicated earlier, the circuit judge is represented on appeal by the Attorney General. Although in the text we say that our request for briefing was directed at the circuit judge, in fact it was directed at the Attorney General. All of the arguments we attribute to the circuit judge in this case were made on his behalf by the Attorney General.

attached to the petition, and even if the reports were not incorporated into the petition by reference, the judge's *sua sponte* acts of requesting the police reports and considering them is supported by the following language from *Reimann*:

> Where a mere technical error on the face of the petition, or an inadequacy in the facts alleged therein, can be cured by a simple request for additional information, justice may be best served under Wis. Stat. § 968.26 by the judge simply making such request or examining the complainant.

Reimann, 214 Wis. 2d at 625. The judge argues that this part of *Reimann* interprets the John Doe statute as generally authorizing the consideration of information outside the petition. We disagree. In this part of *Reimann*, the supreme court is not talking about judges going outside a citizen's "complaint" looking for substantiating or conflicting information. Rather, the court is explaining that judges have the discretion to request additional information in an effort to *assist* complainants. The larger context for the above quote is as follows:

> If . . . the judge finds that the complainant has failed to establish "reason to believe," that judge may deny the John Doe petition without conducting an examination.
>
> This, of course, is not to say that the judge's decision may rest upon prejudice or caprice. In determining whether the petition is worthy of further treatment, a circuit court judge must act as a neutral and detached magistrate. In making this decision, the judge should not weigh the credibility of the complainant or choose between conflicting facts and inferences. For

> some complainants, the John Doe procedures available under Wis. Stat. § 968.26 provide their only entrance to the state courts. Although we believe that circuit court judges must perform some gate-keeping functions under Wis. Stat. § 968.26, we do not here intend to close the doors of the courtroom to those persons who may have reason to believe a crime has been committed. In addition, the judge must recognize that many John Doe petitions are filed *pro se* by complainants not trained in the complexities of criminal law and procedure. Where a mere technical error on the face of the petition, or an inadequacy in the facts alleged therein, can be cured by a simple request for additional information, justice may be best served under Wis. Stat. § 968.26 by the judge simply making such request or examining the complainant.

Id. at 625 (citation omitted). Thus, this part of *Reimann* simply says that judges have the discretion to request additional information to assist a *pro se* complainant.

¶ 26. To sum up, we address no more than the narrow argument before us, namely, that the quoted *Reimann* language supports the circuit judge's request for, review of, and use of the police reports to reject Williams' petition. *Reimann* does not support this argument.

¶ 27. The circuit judge separately argues that he was entitled to consider the police reports because Williams' petition refers to the police reports. The petition states: "The Madison Police Department filed this case under incident report no. 2002–152973." The judge argues that case law holds that a judge "may consider information attached to or referenced in the petition."

¶ 28. Because the police reports in this case were not "attached" to the petition, the part of the judge's argument that matters is his claim that courts may consider documents *referenced* in a petition. But the

only case the judge offers in support, *Friends of Kenwood v. Green*, 2000 WI App 217, 239 Wis. 2d 78, 619 N.W.2d 271, speaks of "attached" documents. *Id.*, ¶ 11 ("When a document is attached to the complaint and made a part thereof, it must be considered a part of the pleading, and may be resorted to in determining the sufficiency of the pleadings."). Because the circuit judge does not offer support for the conclusion that the police reports in this case were "attached" to Williams' petition within the meaning of *Friends of Kenwood* or any similar authority, we address this argument no further.

Conclusion

¶ 29. Because Williams' petition under the John Doe statute contains "reason to believe" a crime has been committed, we grant his petition for a writ of mandamus and direct the circuit court judge to "examine the complainant under oath and any witnesses produced by him." WIS. STAT. § 968.26.[6]

By the Court.—Writ granted.

[6] We do not have occasion to consider what procedures constitute compliance with this statutory directive. Similarly, whether further proceedings are required after the circuit judge complies with the statute is not a question before us. Still, we note that a statement by the supreme court in *State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989), is no longer accurate. In *Unnamed Defendant*, the supreme court said "the John Doe judge 'shall' charge upon finding probable cause." *Id.* at 366. But the "shall" referred to in *Unnamed Defendant* was subsequently changed by the legislature to "may." *See* 1991 Wis. Act 88.

Testimony of William Pollard
SB 51-John Doe Proceedings
Department of Corrections
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing
February 25th, 2009

Chairperson Taylor and Committee Members:

My name is William Pollard and I am the Warden of the Green Bay Correctional Institution. I am here representing the Department of Corrections to testify in support of a change related to John Doe proceedings.

Department of Corrections staff and specifically correctional officers are facing critical hardships from inmates filing John Doe proceedings against them. The present John Doe process is creating a negative impact on employee morale and damaging the reputations of professional and dedicated staff. These employee's names end up in the public eye linked to allegations of criminal behavior. They also face financial hardships when they need to secure legal counsel to represent them.

Under the current John Doe law an inmate may file a written complaint against a staff member directly to a judge. It also gives them the ability to report allegations against staff that may have been investigated by the law enforcement agency in their jurisdiction and found to be without merit. The scope of the examination at this point is at the judge's discretion. Criminal charges can then be filed against this person without consideration for any investigations that have already been conducted and based on nothing more then the statement of one inmate.

There are many potential motives for inmates to file John Doe complaints. It allows them to disregard the DOC administrative complaint process. Some simply want to use it as a tool to harass and make staff's responsibilities

more difficult. Others use it to have a chance to make a court appearance and testify which allows them to leave the institution for the day. This process is also extremely costly to the taxpayers and consumes valuable public and state resources. It also risks public safety every time we have to transport an inmate outside of the institution to court proceedings.

Since inmates have heard about the process of filing John Doe complaints we have had 28 complaints (2008 figures) at the Green Bay Correctional Institution (GBCI). There are over 20 prisons in Wisconsin and I know that many facilities are experiencing similar problems in dealing with John Doe petitions.

I would like to point out at least one case to demonstrate the abuse that is possible. An inmate at GBCI filed a John Doe complaint claiming that correctional staff battered him.

The situation developed due to this inmate's refusal to obey orders and be moved within our segregation unit. Staff followed proper procedure in attempting to gain compliance with the offender.

A cell entry was conducted, the inmate was subdued, restrained and then taken to a nurse to make sure that he had no injuries. The entire incident was video taped. After the incident, the inmate filed an inmate complaint alleging that the cell entry staff punched him, kicked him and pointed a taser at him.

The inmate complaint process is a method for inmates to file complaints in an orderly fashion. If there are allegations of staff misconduct, they are forwarded to the Warden for review and assigned for an investigation. Based on an internal investigation in this case, there was no evidence to support the inmate's allegations. Thus, the inmate was given a conduct report for lying about staff.

After this incident, the inmate filed a John Doe petition alleging misconduct of nine staff members. The allegations included entering his cell, beating, punching and kicking him, pointing a Taser at him, and failing to provide him with adequate medical attention.

The judge evaluated the case and found sufficient cause to obtain testimony from the inmate. We provided all incident reports as well as video tape

documentation of the cell entry. The judge, after reviewing the case, dismissed the petition and specifically noted that the inmate gave false testimony. Under this bill, a judge may consider prior investigative reports in order to determine whether to convene a John Doe matter, thus eliminating unnecessary proceedings.

I have personally reviewed documentation on a number of these cases and worked with our staff to ensure they are prepared to testify in court. I know that these cases have had a dramatic impact on all staff at the institution and throughout the Department. Staff are trained how to deal with disruptive inmates. Staff are concerned that even if they respond in a professional manner that they could still face criminal charges under the current John Doe law. Our fear is that staff may hesitate to respond appropriately to an incident, thus putting them and other staff in a dangerous situation.

Legal action against any staff member creates stress and anxiety, not only in dealing with the incident but also the costs that may arise in defending themselves. We support changes that would help in reducing the financial burden on our staff.

In closing, I appreciate the efforts to make changes to the John Doe law. I would like to thank the committee for the opportunity to testify on this proposed legislation and would be happy to answer any questions.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
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TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FR: Kevin St. John, Special Assistant Attorney General

DT: February 25, 2009

RE: Testimony on 2009 Senate Bill 51

I write today on behalf of the Department of Justice to supplement Attorney General Van Hollen's testimony, which encourages the legislature to adopt a more comprehensive and less costly John Doe reform than 2009 SB 51. While the Department of Justice's preference is for the legislature to adopt Attorney General Van Hollen's proposal, we appreciate the opportunity to address individual elements of this bill that we believe warrant additional drafting or policy consideration.

1. THE PROCEDURE FOR PROSECUTOR-INITIATED JOHN DOES SHOULD BE CLARIFIED TO EXPRESSLY ALLOW DISTRICT ATTORNEYS TO LEAD EXAMINATIONS

If enacted, SB 51 would distinguish district attorney initiated John Doe proceedings from citizen-initiated John Doe proceedings. Correctly, the bill recognizes that citizens should not be on equal footing with prosecutors when it comes to initiating criminal proceedings.

With respect to prosecutor-initiated John Doe proceedings, the bill requires a judge to convene a John Doe proceeding at the request of the district attorney and requires the judge to subpoena witnesses identified by the district attorney. **The Department of Justice believes that Section 4 of the bill would be improved if it made clear that the district attorney may examine the witnesses who appear at the John Doe proceedings, whether or not the prosecutor initiates.** By its plain terms, the bill and current law allow the judge to examine witnesses, but is silent with regard to the district attorney's ability to do so. Because judges have wide latitude in proceeding with an examination ("The extent to which the judge may proceed in the examination is within the judge's discretion"), most judges allow prosecutors to ask questions during a John Doe proceeding. Some do not. The purpose of a John Doe proceeding to a prosecutor is to investigate crime. This purpose is frustrated if the judge alone directs the inquiry. The bill should correct this ambiguity.

2. REQUIRING DISTRICT ATTORNEYS TO PROVIDE A WRITTEN EXPLANATION OF A NO-CHARGE DECISION IN 90 DAYS, DISCLOSE HIS OR HER FILE, AND DISCLOSE POLICE REPORTS DISABLES ADMINISTRATIVE EFFICIENCY AND COULD WAIVE IMPORTANT PRIVILEGES

The bill also provides district attorneys with the ability to evaluate citizen complaints before a judge will convene a John Doe proceeding. The Department of Justice believes this is an improvement over current law, where the district attorney may be bypassed altogether. However, the process used creates additional practical concerns that might be addressed through amendment.

A. 90 Days Is Not Always Sufficient

First, the bill requires a district attorney to "issue charges or refuse to issue charges" within 90 days of receiving a complaint. This is not always sufficient. Sometimes cases simply take longer to investigate.[1] Moreover, it is important to understand that law enforcement officers generally take the lead in investigating crime and a district attorney does not have authority to require law enforcement to conclude investigations on his or her timeline.

Second, the timeline requires district attorneys to reallocate resources. Given the significant understaffing of prosecutor offices compared to caseload, it is often necessary for prosecutors to triage the evaluation and investigation of complaints. Establishing a three-month timeline to conclude investigations will have the effect of requiring district attorneys to prioritize cases—not on factors such as the immediate public safety risks posed to a community—but on whether a citizen was strategic enough to use the John Doe process as opposed to merely lodging a complaint with police or the district attorney.

The bill should not have a firm 90-day deadline for a prosecutor's charge or no-charge decision.

B. Complications Arising From Requiring a Written Explanation of a No Charge Decision and Mandating Disclosure of Records

Second, the bill creates a requirement that the district attorney provide a written explanation as to why he or she refused to issue charges, as well as file all law enforcement investigative reports

[1] This is particularly true in cases involving criminal organizations or conspiracy, where it is not uncommon for the prosecution of a crime to be postponed while investigation into the larger criminal enterprise is continued. In addition, for example, cases involving significant forensic analysis, time must be allocated for the forensics to be performed, for the evidence to the reviewed, and for follow-up traditional law enforcement investigation necessitated by forensic leads. Other times a prosecutor may wish to request a John Doe—a proceeding that does not appear to stay the 90-day timeline under the bill.

and his or her file. This results in the following complications:

- Traditionally, a prosecutor's files and work product has been privileged from disclosure. This common law privilege, commonly referred to as the *Foust* exception, is supported by numerous public policy arguments and has been reinforced several times by the state Supreme Court. This bill would appear to require a district attorney to provide information to the judge, presumably creating a record subject to disclosure that would effectively eliminate this well-recognized privilege (absent filing this information under seal). While it may be appropriate for a prosecutor, on a case-by-case basis, to inform the public why he or she decided to charge or refuse to charge certain conduct, the blanket elimination of this well-recognized privilege may serve as a roadmap to criminals. The release of this information may encourage strategic criminal behavior. **The bill should protect the *Foust* exception**;

- Requiring a written explanation may add workload to the understaffed district attorney's offices in the state Wisconsin;

- Prosecutors are not necessarily custodians of law enforcement reports. The bill thus requires a district attorney to produce materials that may not be in the custody of the district attorney. **The bill should not require the disclosure of materials to a court that are not in the prosecutor's custody.**

3. THE INDEMNIFICATION OF STATE EMPLOYEES CREATES CONFLICTS AND CONTAINS OVERBROAD LANGUAGE

The cost of John Doe abuse has fallen disproportionately on state employees, who have been wrongly accused by inmates of committing crimes. This bill's solution to this problem is not to cut off frivolous petitions—as the Attorney General Van Hollen proposes—but to indemnify state employees' legal bills. This places into the statutes the understandable judgment of previous claims bills, which have had the effect of providing similar indemnity.[2]

While failing to remedy most of the harm suffered by innocent state employees, the bill creates numerous complications:

- First, while Section 1 states that the "protection afforded by this section applies to a proceeding under s. 968.26 in which a state officer or state employee is a subject to charges," *no one* is subject to charges in a John Doe proceeding. Individuals are only subject to charges once a criminal complaint is filed. In some John Doe proceedings, the "target" is unknown. As stated previously, the John Doe proceeding is an inquest, not an

[2] The emotional and other damages suffered by innocent state employees being dragged through frivolous John Doe proceedings will not be stopped by this bill. These damages would be averted altogether if the Legislature were to adopt the Attorney General's proposal.

adjudicative hearing.

- Second, the bill imposes the obligation to make the initial indemnification determination on the Attorney General's Office. The Department of Justice is charged with representing the state in all felony appeals, and from time to time acts as prosecutor in the circuit courts. Requiring this office to make the indemnification determination invites a conflict. While this might be mitigated by appropriate internal screens, it makes no more sense to impose a duty on a law enforcement office to indemnify criminal defendants—however innocent—as it does to put the state public defender's office under the Attorney General's supervision.

- Third, the indemnification language would attach to those cases in which a district attorney convened a John Doe proceeding. This means that the state employee gets indemnified for criminal defense costs if the crime required a John Doe proceeding to adequately investigate. While the desire to mitigate the effects of inmate-initiated John Doe proceedings on state employees is laudable, the nature of a *law enforcement investigation* should not determine whether a state employee should be indemnified. This provision could impact investigations into public misconduct.

- Fourth, the "fact question" of whether a criminal action commences "as a result" of a John Doe proceeding will be very difficult to answer in some cases where the district attorney has convened a John Doe. When law enforcement and a district attorney investigate crime, a John Doe proceeding may be used, but rarely will it be clear whether the charges are commenced as a result of the proceeding as opposed to other investigative information.

- Fifth, taxpayers should *never* pay for criminal defense *solely* because the defendant is a state employee. While as a matter of public policy it can be debated whether state employees should be provided with a public defender or have their legal bills paid if they were acting in the scope of employment, *it is not clear that this bill is so limited.* The bill states that "[r]egardless of the [indemnification] determination made by the Attorney General, the protection afforded by this section applies if the state officer or employee is not found guilty in the criminal action," making ambiguous reference at best as to the requirement that the employee acted within the scope of employment. This ambiguity can likely be fixed with a technical amendment.

4. THE STANDARD FOR A JUDGE TO CONVENE A CITIZEN-INITIATED JOHN DOE IS NOT RECOGNIZED IN THE LAW

Section 5 of the bill requires a judge to convene a John Doe proceeding if the judge "determines that a proceeding is necessary to determine if a crime has been committed."

It is not clear what the standard means.

Logically, this standard can never be met. John Doe proceedings are inquests, and *never* conclude with a determination that crime is been committed. Juries are the constitutional body to answer the question of whether a crime has been committed.[3]

Of course, it would be reasonable to assume that courts would attempt to give this language meaning when interpreting the bill if enacted. What meaning would it have? The phrase "necessary to determine if a crime has been committed" is novel; it does not have a recognized meaning in the law. It is difficult to predict how this language will be interpreted by courts.

Under the current John Doe statutes as interpreted by the courts, judges *must* convene a John Doe if a complaint alleges facts that raise a reasonable belief that a crime has been committed. *See State ex Rel. Reimann v. Circuit Court for Dane County*, 214 Wis.2d 605 (1997). While this bill makes clear that a judge may consider law enforcement reports and other records, the Wisconsin Court of Appeals has held that a judge considering those reports may not weigh evidence in the manner the district attorney does every day when deciding whether to conduct further investigation or charge. *State ex rel. Williams v. Fiedler*, 2005 WI App 91, ¶¶ 16-23. That decision is based in part on a recognition that the John Doe proceeding is an inquest. The fundamental nature of the proceeding is not changed by this bill. It is possible that this precedent will survive this reform measure, particularly where the standard has no common usage.[4]

By using novel terms and maintaining the mandatory command that proceedings shall be convened if this standard is met, it is unknown whether this bill, if enacted, will be interpreted to provide greater latitude to judges than existing law when deciding whether to convene a John Doe proceeding. **If the bill's intent is to provide judge's with greater discretion when determining whether to convene a John Doe proceeding, it should incorporate another standard or use discretionary language, i.e., may instead of shall.**[5]

5. THE STANDARD FOR A JUDGE TO ISSUE A CRIMINAL COMPLAINT PROVIDES ELECTED DISTRICT ATTORNEYS WITH NO DEFERENCE

Under current law, as properly interpreted, a judge has the discretion to issue a criminal complaint after a citizen-initiated John Doe proceeding if it "appears probable from the

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[3] The *baseline* question a prosecutor asks *after investigation* is whether there is probable cause to believe a crime has been committed. Without it, he or she may not file charges. This baseline is a floor which is nearly always exceeded when making a charging determination. There is no hard rule governing the practical standard a prosecutor applies above and beyond probable cause when deciding to charge, though the prosecutor typically considers whether he or she has a reasonable expectation of conviction prior to charging.

[4] It is also possible that a court could interpret the "necessary to determine if a crime has been committed" standard to refer to the standard for the judicial issuance of a complaint, which the bill provides is a judge's finding of "sufficient credible evidence to warrant prosecution of the complaint"—another standard without consistent judicial interpretation.

[5] The Department of Justice agrees with the apparent intent of this bill that the "reasonable cause" or "probable cause" standard in current law results in too many frivolous John Doe proceedings.

testimony given that a crime has been committed and by who committed." If enacted, SB 51 would change the standard, stating that "the judge may issue a criminal complaint if the judge finds sufficient credible evidence to warrant prosecution of the complaint." The bill also makes clear that the judge may consider law enforcement reports and other relevant reports in making this determination.

While this change enables the judge to consider a totality of the evidence, it adopts a standard ("credible evidence to warrant prosecution") that does not have a well understood meaning in the law. As Attorney General Van Hollen states in his written testimony, a proper separation of power between the judiciary and the executive would allow a prosecutor's judgment and discretion to stand. While the Department of Justice believes that judges are not the proper officials to oversee the district attorney's decision to not charge, if a judge is to second-guess a district attorney, then *some* deference should be given to the district attorney's initial decision. In administrative law, for example, courts will typically provide due weight or great weight deference to the executive officer administering the law. At a minimum, this deference should be extended to district attorneys. Instead, the bill allows a judge to make a charging decision, *de novo*, as if he or she were the prosecutor.

6. ALLOWING SECTION 968.02(3) TO STAND WITHOUT AMENDMENT CREATES A LOOPHOLE AROUND ANY JOHN DOE REFORM

In addition, any John Doe reform needs to address s. 968.02(3). This provision allows a court to issue a criminal complaint when a district attorney refuses to do so. Any limitations the legislature intends to put on a judge's authority to issue charges should similarly be incorporated in this section.

* * *

Thank you for the opportunity to submit this testimony.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FR: Attorney General J.B. Van Hollen

DT: February 25, 2009

RE: Testimony on 2009 Senate Bill 51

ATTACHMENTS: Alternate John Doe Reform Proposal Supported by Attorney General

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I fully agree that the John Doe statute should be reformed. Too many lives have been disrupted by—and too many state and local resources spent on—frivolous, inmate-initiated, John Doe proceedings. While this bill would make some improvements to existing law, it is the wrong approach to reform. This bill's solution to the problem of frivolous John Doe complaints is not to prevent them, but to spend more state and local money and involve more judicial and prosecutor resources to relieve only a fraction of the harm caused by citizen- and inmate-initiated John Doe complaints.

There is a simpler solution. I propose that we let judges be judges and our elected prosecutors be prosecutors. I propose we properly limit the initiation of criminal inquest proceedings and the filing of criminal charges to district attorneys. My reform would:

- Provide more protection to state employees
- Save state and local taxpayer-funded resources
- Restore proper notions of separation of powers; and
- Enhance judicial impartiality in criminal proceedings

In these tight fiscal times, it is all the more imperative to reform bad law in a way that *saves* taxpayer money and more thoroughly solves the problems existing law creates. My proposal will do that.

Understanding the problem with the current John Doe statute and the proposed legislation begins by recognizing two fundamental principles of our criminal justice system.

First, in our system, crimes are offenses not just against crime victims, but against the public at large. It follows that it is the public's representatives—in Wisconsin, the elected

district attorneys—who prosecute crimes. Criminal punishment does not exist merely to serve as retribution. It exists to achieve society's broader goal of deterrence and also to express the community's condemnation of criminal behavior. This is why criminal cases are not captioned *Smith v. Jones*. They are captioned *State v. Jones*, and in some states, *People v. Jones.*

The second fundamental principle of our criminal justice system is that the role of a prosecutor is different than the role of a judge. It is antithetical to the traditional American conception of justice—and threatens the actual and perceived impartiality of the administration of justice—to have judges act as prosecutors, initiating criminal charges and then presiding or sitting in judgment of those charges.

The John Doe statute, both as it exists and as under the proposed reform, violates both of these fundamental principles. Citizens, not just elected and accountable prosecutors, may initiate this criminal inquest proceeding. Judges, not just elected and accountable prosecutors, may file criminal charges.[1]

The John Doe proceeding serves an important and legitimate law enforcement purpose when initiated by a prosecutor. It is used by prosecutors as a tool to investigate crime. The key advantage to using the John Doe proceeding is that prosecutors can have witnesses subpoenaed, who are thus compelled to testify (while preserving the right against self-incrimination). In the federal system, grand jury proceedings serve this purpose.[2]

To the inmate or citizen, however, a John Doe proceeding is a tool to act as a private district attorney, albeit one with limited powers. Most charitably, inmates or citizens often invoke this process to right a perceived wrong, and they often do so because of a general frustration with "the system." Sometimes this frustration is occasioned by a prosecutor's decision not to prosecute. Sometimes prosecutors are never informed of the underlying complaints. And sometimes citizens or inmates appear to use John Doe proceedings to harass authority or to gain advantage in a private lawsuit.

As the committee is aware, the John Doe proceeding can involve great expense. At a minimum, courts must clear their dockets and hold a hearing. Other cases are subsequently delayed. In a matter involving an inmate's allegation that a crime has been committed by a corrections officer, the inmate-complainant (and possible other inmate-witnesses) may need to be taken out of prison to attend court. Public employees will need to provide secured transportation to court. Other witnesses, such as Department of Corrections personnel, might be taken away from the job while the state pays for them to attend a day in court. The potential cost to innocent state employees, too, is quite real, in terms of legal bills and emotional distress.

To what positive end is this extraordinary cost? In a nutshell: none.

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[1] This latter problem is duplicated in Wis. Stat. § 968.02(3), which I believe should be repealed.
[2] Grand juries can also be convened under Wisconsin law, but this is rarely done.

Importantly, **no rights are denied if citizens and inmates are prevented from invoking John Doe proceedings.** Though some argue that John Doe proceedings provide citizens "their day in court," this rationale fundamentally misconstrues the nature of a John Doe proceeding. John Doe proceedings are *inquests*, they do not adjudicate claims. Even if a citizen-initiated John Doe proceeding results in the judicial issuance of the complaint, it is ultimately the responsibility of an appointed special prosecutor to proceed with the prosecution. Frequently, these prosecutors will dismiss the charges after reviewing the case. Of course, this occurs only after taxpayers have paid for the services of the special prosecutor and after the defendant has suffered significant monetary and other costs.

Nowhere else in the statutes do citizens have special rights to conduct criminal investigations. It would strike most people as eminently sensible that a private citizen can not fill out a probable cause affidavit and obtain a warrant to search his or her neighbor's home. Similarly, the ability to conduct criminal investigations through use of the John Doe proceeding should be limited to prosecutors who are accountable to the public and have sworn an oath.

Significantly, without the ability to seek a John Doe proceeding, individuals will continue to have access to our courts. These individuals will continue to be able to bring private rights of action if they have suffered a legally cognizable harm.

I have heard it argued that another reason to provide citizens the ability to initiate a John Doe proceeding and to allow judges to issue criminal complaints is to serve as a check on prosecutors who fail to prosecute cases where there is cause to do so.

First, this argument ignores the reality that prosecutors *must* exercise their judgment and discretion in determining whether or not to bring charges in a particular case. The charging decision is based on a variety of factors, including the reliability of the evidence and the nature of the conduct. A prosecutor evaluates these factors using his or her intellect, wisdom, expertise, and experience. Sometimes it is in the interest of justice to prosecute a crime to the full extent permitted by law. Other times, justice is achieved through plea bargains, by not issuing criminal charges, or by deferring prosecution. And always, as a prosecutor tries to satisfy the community's goals of criminal justice in an individual case, he or she must recognize the reality of limited resources. A prosecutor must manage these resources to further the same goals in other cases.

Reasonable minds might differ with how to exercise this judgment and discretion with respect to a charging decision in an individual case. But we elect district attorneys largely on the basis of how we believe the district attorney will exercise his or her judgment and discretion. **If the public does not agree with how a district attorney performs his or her functions, then the remedy is at the ballot box.**

In cases where the failure to bring charges is a capricious exercise of discretion, the law provides other avenues to enable criminal prosecution. If the prosecutor's inaction is due to a conflict, then the court can appoint special counsel. In any situation, the governor can appoint special

counsel to bring a criminal action. Similarly, the governor can remove a district attorney for cause.

Second, the argument presumes there *is* improper prosecutorial conduct relating to the failure to file charges. But there is no evidence that this is the case, or that if this is the case, that inmate- and citizen-initiated John Doe proceedings are an effective backstop against prosecutorial inaction. **Empirically, inmate- and citizen-initiated John Doe proceedings simply do not result in criminal convictions.** Rarely is a criminal complaint issued as a result of these proceedings. And even when criminal complaints are issued, the most frequent outcome is voluntary dismissal. I asked my staff to identify a single sustained criminal conviction that arose from a citizen-initiated John Doe proceeding. None were identified.

Citizen-initiated John Doe proceedings are expensive, ineffective, and offend traditional conceptions of criminal justice designed to promote impartiality. The abuses that this bill aims to correct are real, and this bill may well improve current law.

But I believe this bill is the wrong approach.

Would you want a prosecutor to file charges and then sit in judgment of those charged? I am sure your answer is no. We should not permit judges to do so either. Would you want unaccountable individuals—including those incarcerated—to expend and consume state resources to exercise the awesome power of the criminal justice system to investigate crime, possibly even in secret? I expect your answer is also no.

And that is why respectfully urge you to say no to this bill, no to the status quo, and yes to my proposal that solves John Doe abuse.

ATTORNEY GENERAL VAN HOLLEN'S PROPOSED JOHN DOE REFORM

986.26 of the statutes is amended to read:

968.26 John Doe proceeding.

(1) IN GENERAL. If a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall convene a John Doe proceeding. The attorney general may file a John Doe complaint where the attorney general has reason to believe that a district attorney, assistant district attorney, or judge has committed a crime in the jurisdiction, whereupon a John Doe proceeding shall be convened. The attorney general's complaint shall be filed with the chief judge of the judicial district where the crime is believed to have been committed who shall assign a judge to preside over the proceeding. In any proceeding initiated by the attorney general, he or she shall have all of the powers of a district attorney as set forth in this section.

(2) SUBPOENAS. The judge, at the request of the district attorney, shall subpoena witnesses. The judge shall issue subpoenas for records upon certification by the district attorney that the information likely to be obtained by the subpoena is relevant to the investigation.

(3) EXAMINATION. The district attorney shall examine the witnesses under oath to ascertain whether a crime has been committed and by whom committed. Any witnesses examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. Counsel may consult with his or her client while the client is being examined. The examination may be adjourned and the extent of the examination is within the judge's discretion.

(4) SECRECY. The proceeding shall be secret unless otherwise ordered by the judge. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney or upon the subpoena of a federal grand jury unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

(5) IMMUNITY. The judge, on the motion of the district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085.

(6) CHARGES. The district attorney shall determine whether to issue a criminal complaint. Where the attorney general has determined to issue a complaint under this section, the attorney general shall have all of the powers of a district attorney to prosecute the complaint.

978.045 of the statutes is amended to read:

(1r)(i) There is reason to believe a crime has been committed by the district attorney within the district attorney's jurisdiction.

968.02(3) of the statutes is repealed.

969.01(3) is amended as follows:

(3) Bail for witness. If it appears by affidavit that the testimony of a person is material in any felony criminal or John Doe proceeding and that it may become impracticable to secure the person's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness. If the witness is not in court, a warrant for the person's arrest may be issued and upon return thereof the court or John Doe judge may require the person to give bail as provided in s. 969.03 for the person's appearance as a witness. If the person fails to give bail, the person may be committed to the custody of the sheriff for a period not to exceed 15 days within which time the person's deposition shall be taken as provided in s. 967.04.

972.08 is amended as follows:

(1) (a) Whenever any person refuses to testify or to produce books, papers or documents when required to do so before any grand jury, in a proceeding under s. 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court or John Doe judge on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

(b) The immunity provided under par. (a) is subject to the restrictions under s. 972.085.

(2) Whenever a witness attending in any court trial or appearing before any grand jury or John Doe investigation fails or refuses without just cause to comply with an order of the court or John Doe judge under this section to give testimony in response to a question or with respect to any matter, the court or John Doe judge, upon such failure or refusal, or when such failure or refusal is duly brought to its attention, may summarily order the witness's confinement at a suitable place until such time as the witness is willing to give such testimony or until such trial, grand jury term or John Doe investigation is concluded but in no case exceeding one year. No person confined under this section shall be admitted to bail pending the determination of an appeal taken by the person from the order of confinement.